STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 25, 2001
v	No. 215495 Macomb Circuit Court
RONALD ALLEN SHACKLETT, Defendant-Appellant.	LC No. 97-000293-FC

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28,788(3)(1)(a). The court sentenced defendant to ten to twenty years' imprisonment for the first-degree CSC conviction and to ten to fifteen years' imprisonment for the second-degree CSC conviction. Defendant now appeals as of right, and we affirm.

Defendant claims that insufficient evidence existed to support his convictions. We disagree. The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400.

The victim testified that when she was six years old, defendant, while acting as her babysitter, penetrated her vagina with his finger and engaged in sexual contact with her by rubbing her breasts. Viewing the evidence in a light most favorable to the prosecution, the victim's testimony was sufficient to support a finding that defendant committed first-degree and second-degree CSC. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). To the extent that defendant claims that there was conflicting evidence presented concerning his guilt or that there was a lack of corroborating evidence to support the victim's claim, "the question is not whether there was conflicting evidence [or corroborating evidence], but rather whether there was evidence that the jury, sitting as the trier of fact, could

choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant." *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994). The victim's testimony, standing alone, if believed by the jury, was sufficient to support defendant's convictions of first-degree and second-degree CSC. *Id.* To the extent that defendant attacks the victim's credibility in support of his claim that the evidence was insufficient to support his conviction, we note that this Court will rarely overturn a conviction—and we decline to do so here—when the only issue is the credibility of a witness. *Wolfe, supra* at 508; *People v Crump*, 216 Mich App 210, 215; 549 NW2d 36 (1996).

In a related claim, defendant argues that the trial court abused its discretion in concluding that his convictions were not against the great weight of the evidence. Motions for a new trial, based on a claim that the verdict was against the great weight of the evidence, are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). As indicated above, the evidence presented in this case was sufficient to support the verdict. Although there was no evidence to corroborate the victim's testimony, there was essentially no evidence to contradict it. Under these circumstances, the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski, supra* at 28. Moreover, defendant's main challenge is to the credibility of the victim. In *Lemmon*, our Supreme Court indicated that, absent exceptional circumstances, which are not present here, the trial court may not substitute its view of the credibility of the victim for the constitutionally guaranteed jury determination thereof. *Lemmon, supra* at 642. The trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000).

Defendant also says that he was denied the effective assistance of counsel. In order for this Court to reverse because of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceedings would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). We have reviewed defendant's allegations of deficient performance and find no basis for relief on the ground of ineffective assistance of counsel. Defendant's allegations involve matters of trial strategy or matters that had no effect on the outcome of the proceedings. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

We also reject defendant's claim that he was denied a fair trial by instances of prosecutorial misconduct. Defendant did not object to the alleged instances of prosecutorial misconduct. Therefore, he must show that he was prejudiced by plain error, and we can reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant has not shown plain error. The allegedly improper remarks made by the prosecutor during closing argument and the prosecutor's questioning of Detective Duquette were

all in response to issues raised previously by defendant. Hence, even if improper, these actions do not support reversal. When impermissible comments are made in response to arguments previously raised by defense counsel, reversal is not required. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993); *People v Stacy*, 193 Mich App 19, 36; 484 NW2d 675 (1992).

Defendant also asserts claims that the trial court abused its discretion in excluding the testimony of his sister, Shelley Keary. We disagree. The parties stipulated to the entry of a sequestration order at the commencement of trial, Keary sat through the entire trial in violation of the order, witness credibility was a key issue in this case, and the trial judge indicated that it would be unfair to allow Keary to testify after hearing the testimony of other witnesses. Under these circumstances, the trial court did not abuse its discretion in excluding Keary's testimony. *People v Walton*, 76 Mich App 1, 4; 255 NW2d 640 (1977).

As to defendant's claim that the trial court abused its discretion by denying his request to allow discovery into the victim's medical records, we note that after being assured by the prosecutor that he did not have the type of medical records defendant was seeking, defense counsel essentially withdrew his request for the medical records, indicating that he would rely on the representations of the prosecutor. Therefore, defense counsel waived this issue. A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998); *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991). As to defendant's claim that the trial court abused its discretion in denying his request for the victim's psychological records, the record reveals that defendant never requested the victim's psychological records. Therefore, this issue is not preserved for appellate review. *People v Green*, 228 Mich App 684, 690-691; 580 NW2d 444 (1998).

Additionally, defendant alleges that he was denied his due process rights to a fair trial by the ten-year delay between the incidents in question and his arrest. We disagree. The Due Process Clause plays a limited role in preventing unjustified preindictment or prearrest delay. *United States v Marion*, 404 US 307, 324-326; 92 S Ct 455; 30 L Ed 2d 468 (1971); *United States v Lovasco*, 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977); *People v Nuss*, 405 Mich 437, 453; 276 NW2d 448 (1979); *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). "In determining whether dismissal is warranted by a delay, a defendant must show substantial prejudice to his right to a fair trial and intent by the prosecution to gain a tactical advantage." *White, supra* at 126. Defendant has failed to meet either prong of the test. The record reflects that the victim, six years old at the time of the incidents in question, was slow to come forward because of her fear that it would cause disharmony among her family. Therefore, the delay was attributable to the victim's failure to report the crime to law enforcement authorities. There is nothing in the record to indicate that the delay was in any way attributable to the prosecutor or intended to secure a tactical advantage on the part of the prosecution. Additionally, there is no evidence that any delay was deliberately intended to prejudice defendant or that defendant was, in fact, prejudiced by the delay. Although defendant claims that he was prejudiced by the prearrest delay because "people just [do not] remember things this long ago and it is prejudicial to charge somebody ten years after the commission of a crime," he has failed to specifically identify any material witnesses whose memory was impaired over the course of time.

Nor does he allege the existence of any exculpatory evidence that could have been produced had there not been such a lengthy prearrest delay. Therefore, defendant's claim that he was denied a fair trial by the ten-year prearrest delay must fail.

Defendant also claims incorrectly that the trial court erred when it denied his motion to specify the time of the offenses. An information need only provide the time of an offense "as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b); MSA 28.985(1)(b). In *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986), this Court established several factors that a trial court should consider in determining when and to what extent specificity of the time of the offense will be required. They include: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. "Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of his or her knowledge after undertaking a reasonably thorough investigation, an information or bill of particulars will not be deemed deficient for failure to pin down a specific date." *People v Miller*, 165 Mich App 32, 46-47; 418 NW2d 668 (1987). Here, the information indicated that the offenses were committed in 1987. The trial court was informed of the nature of the offenses, the age of the victim and her inability to recall the dates and times of the offenses. Furthermore, the prosecutor indicated that, because of the victim's age at the time of the offenses, an exact date and time of the offenses could not be specified. Moreover, because time is not an element of a sexual assault offense, *Naugle*, *supra* at 235, defendant was not prejudiced in preparing a defense. Under these circumstances, we do not believe that the trial court abused its discretion by denying defendant's motion to specify the time of the offenses. *Miller*, *supra* at 46.

Lastly, we reject defendant's claim that his sentences are disproportionate. Defendant's minimum sentences are at the lowest end of the sentencing guidelines' recommended range of ten to twenty-five years and, therefore, they are presumptively proportionate. *People v Broden*, 428 Mich 343, 354, 355; 408 NW2d 789 (1987). Defendant has failed to present any unusual circumstances that would overcome that presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Moreover, after reviewing all the facts and circumstances involved in this case, the trial court did not abuse its discretion in imposing the sentences. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). Defendant has a lengthy criminal history, including a prior felony conviction and seven prior misdemeanor convictions, and sexually abusing his six-year-old niece is a very serious offense. Therefore, the sentences imposed reflect the seriousness of the circumstances surrounding the offenses and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The sentences do not constitute an abuse of discretion. *St John*, *supra* at 649. As to defendant's claim that the trial court failed to articulate sufficient reasons for the sentences imposed, we note that the trial court referred to the sentencing guidelines before imposing sentences within the guidelines. This was sufficient to satisfy the articulation requirement. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder